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## THE PRIVILEGE AGAINST SELF-INCRIMINATION

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### I. HISTORY

#### A. IN ENGLAND

BOTH Wigmore<sup>1</sup> and Mary Hume Maguire<sup>2</sup> find the roots of the privilege against self-incrimination in the resistance of Englishmen to the so-called oath *ex officio* of the ecclesiastical courts. Wigmore thinks that until 1533 the opposition was confined to issues of the scope of ecclesiastical jurisdiction, while Mrs. Maguire sees persuasive evidence of much earlier objection to its use in situations where jurisdiction was unquestioned. The offensive characteristic of the procedure of which the oath was a part was its requirement that a person who had not been charged by a formal presentment or accusation answer under oath all questions put to him by the proper ecclesiastical official. The purpose of the inquiry was to discover suspected violations of church law or custom, or to establish the truth of either vague or definite charges not disclosed to the person questioned. The earlier form of the oath was introduced in the ecclesiastical courts of England in 1236, the later form in 1272.

If we may believe Matthew Paris,<sup>3</sup> Grosseteste, Bishop of

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1. 8 Wigmore, Evidence § 2250 (3d ed. 1940).

2. Essays in History and Political Theory in honor of Charles Howard McIlwain, c. VII, Attack of the Common Lawyers on the Oath Ex Officio as Administered in the Ecclesiastical Courts in England, p. 199 (Cambridge 1936). Hereafter referred to as Maguire.

3. IV Matthaei Parisiensis Chronica Majora 579. The text is as follows:

[*Qualiter episcopus Lincolnienensis desocvit in suos subjectos.*]

His quoque diebus, cum episcopus Lincolnienensis supra quam deceret vel expediret, in subjectos suos, ad sug- gestionem, ut dicitur, Praedicatorum et Minorum, desaeviret; ita scilicet ut faceret inquisitiones districtas per	The king forbids the inquisitions established by bishop Grosseteste in his diocese.
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Lincoln, in 1246 instituted rigid inquiries into the conduct and morals of both great and humble in his diocese, thereby causing serious injury to the reputation of many. This brought bitter complaints from the people; and the king with the advice of his council wrote the sheriff of Hertford, commanding him not to allow any laymen of his bailiwick to appear before the Bishop or his officials and make answer under oath in any causes except those involving matrimony or testaments. The bishop then declared that the king wanted to follow in the footsteps of certain conspirators who had already exhibited similar audacities in France. This Prynne characterizes as "an insolent, undutiful answer of a furious turbulent willful Prelate."<sup>4</sup> He then relates the later stages of the controversy of Henry III with the bishop, accurately quoting the close rolls. In the following year in consequence of the bishop's disobedience a new writ was issued to the sheriff directing him to put the bishop under gage and surety to appear before the king and his justices to show why he had caused laymen and laywomen to be summoned to take the newly devised oath.<sup>5</sup> The bishops of Gloucester and of Worcester followed the example of the bishop of Lincoln, and similar

A.D. 1246

archidiaconos et decanos suos in episcopatu suo de continentia et moribus tam nobilium quam ignobilium, in enormem laesionem famae multorum et scandalum, quod nunquam fieri consueverat; dominus rex audiens super hoc populi graves querimonias, consilio curiae suae, scripsit vicecomiti Hertfordiae in haec verba:

"Henricus Dei gratia rex Angliae, etc. Praecipimus tibi, quod sicut te ipsum et omnia tua diligis, non permittas quod aliqui laici de balliva tua ad voluntatem episcopi Lincolnensis archidiaconorum vel officialium seu decanorum ruralium in aliquo loco convenient de caetero, ad recognitiones per sacramentum eorum vel attestaciones aliquas faciendas, nisi in causis matrimonialibus vel testamentariis." Quod cum audisset episcopus, asserebat dominum regem quorundam conspiratorum qui jam in Francia in consimilem audaciam proruperunt, de quibus in sequenti folio plenius enarratur, vestigia secuturum.

4. William Prynne, *An Exact Chronological Vindication and Historical Demonstration of our British, Roman, Saxon, Norman, English Kings Supream Ecclesiastical Jurisdiction*, The Second Tome 699 (1666-dedication dated 1665).

5. *Id.* at 705. The writ is found in the Close Rolls for the thirty-third year of Henry. Close Rolls of the Reign of Henry III (1247-1251) 221-222 (1922).

writs were in 1251 addressed to them;<sup>6</sup> and in the next year the king directed a mandate to the bishop of Lincoln stating that he had received complaints that the bishop and his officials were still harassing the people of his diocese by citing them to appear and excommunicating them for failure to do so and compelling them to give testimony upon oath of the private sins of others, whereby many Christians were shamefully defamed and might incur the dangers of perjury; he therefore forbade the bishop to continue these practices and warned that unless he did desist, royal punishment would follow ("vos sustiners non poterimus ulterius quin ad hoc manus regias apponemus").<sup>7</sup>

In the Articuli Clerici of 9 Edward II<sup>8</sup> are set forth the rights of the clergy and their courts to be free from interference in specified situations by lay officials and from writs of prohibition by the King's justices. At a later date in the same reign, the *Prohibitio formata de Statuto Articuli Clerici*,<sup>9</sup> addressed to the prelates and ecclesiastical officials of the diocese of Norwich, put definite limits to their authority. It first specified numerous causes of which the King's Courts had exclusive jurisdiction, stated that the ecclesiastical officials had, as the King was reliably informed, been drawing some of them into their courts, and expressly prohibited them from holding such pleas in their courts. Next, it commanded the sheriffs to forbid them from doing so, and, if they violated the prohibition, to put them under gage and pledge to appear before the King's justices at Westminster. Then comes the sentence:

"Et quod non permittant quod aliqui laici in balliva sua in aliquibus locis convenient ad aliquos recognitiones per sacramenta sua facienda, nisi in causis matrimonialibus et testamentariis."<sup>10</sup>

The sentence following this, like those preceding it, refers to the exercise of jurisdiction by the spiritual judges over such (*hujusmodi*) fees, debts and chattels. The *Prohibitio* ends with a command that the sheriffs report what the ecclesiastical officials shall do in this behalf. The English translation of the quoted sentence given in the Statutes of the Realm, following the 1603 edition of Rastall, is:

6. *Id.* at 554.

7. Close Rolls of the Reign of Henry III (1251-1253) 224-225 (1927) Prynn *op. cit. supra* note 4, at 705, 706.

8. 1 Statutes of the Realm 171 (1315-16).

9. *Id.* at 209 (date uncertain).

10. In the original text a number of words are abbreviated in the customary manner. Wigmore's quotation has "ballione" in place of "balliva." Wigmore, *op. cit. supra* note 1, at 278. Mrs. Maguire's quotation agrees with 1 Statutes of the Realm 209 as quoted in the text. Maguire, *op. cit. supra* note 2, at 205.

"And they suffer not that any Laymen within their Bailiwick, come together in any Places to make any such Recognitions by their Oaths, except in Causes of Matrimony and Testamentary."<sup>11</sup>

This translation entirely disregards two important items. First, in every other part of the *Prohibitio*, wherever causes or pleas of the same sort are referred to, the reference is in unmistakable terms. Here the most indefinite adjective, "*aliquis*," is used both as to the "recognitions" and as to the places. Second, this sentence contains the only reference to the oath procedure. Consequently, it seems that this language ought not to be limited by the context, and would be more reasonably interpreted as a direction to the sheriffs to prohibit any laymen to come together in any place for any examinations or investigations to be made under their oaths, except in causes matrimonial or testamentary.

Baldwin informs us that in criminal cases before the King's Council during this same period the accused was required to appear in person, without counsel, and to "answer the charges, which were most likely not known to him in advance. . . . If he did not immediately confess or satisfactorily explain the charges, he was put to the method known as the interrogatory examination. This was an acknowledged feature of the civil and canonical law, which in its extreme form was pursued by the church especially but not exclusively in heresy trials. It was a method that was creeping into secular practice, in the courts of king's bench and common pleas, as early as the reign of Edward I. . . . As practically administered the examinations were of several kinds or degrees, according to the nature of the case and the advancement of the art of questioning."<sup>12</sup>

This practice brought protests from the Commons with promises from the King that henceforth it would not be done without reason.<sup>13</sup> And in the 25th year of Edward III, a statute, referring to *Magna Charta*, declared that "from henceforth none shall be taken by petition or suggestion made to our lord the King, or to his Council, unless it be by indictment or presentation of good and lawful people of the same neighborhood where such deeds be done, in due manner, or by process made by writ original at the common law; . . ."<sup>14</sup> In 1368 another statute provided that in order "to eschew the mischiefs and damages" done by causing persons falsely accused to be brought

11. 1 Statutes of the Realm 209.

12. *Select Cases before the King's Council (1243-1482)* edited for the Selden Society by I. S. Leadam and J. F. Baldwin, xlii, Vol. 35 (1918).

13. II *Rotuli Parliamentorum* 168, item 28 (1347).

14. 1 Statutes of the Realm, 319, 321 (IV) (1351-2). (In original all nouns are capitalized.)

before the King's Council by writ, no man should "be put to answer without presentment before justices, or matter of record, or by due process and writ original, according to the old law of the land."<sup>15</sup>

These authorities seem to indicate that at these early dates the opposition to inquiries of this sort was not confined to jurisdiction. It could hardly be urged that the Courts Christian had no jurisdiction over heresy, nor could it be maintained that the King's Council was without power to make the investigations in question. No doubt the King was more interested in the jurisdictional question than in the procedure, but it was clearly the forced subjection to inquisitional procedure that aroused the opposition to Grosseteste and caused the protests against the action of the King's Council. And it is more reasonable to conclude that the same issue was involved in the *Prohibitio*. Consequently Wigmore's brusque dismissal of Mrs. Maguire's contention on the ground of her lack of acquaintance with the common law authorities carries little weight.

The bishops of Lincoln and Worcester were not alone in their resistance to these limitations. The prelates in some inexplicable manner had a purported Act of Parliament put on the statute books as having been enacted in the second session of the parliament in the fifth year of Richard II, which in terms gave them the power they wanted against heretics.<sup>16</sup> After reciting that "divers evil persons" had preached in various places to great congregations "divers sermons containing heresies and notorious errors," and had disobeyed summons and citations of the ordinaries and cared not for the censures of the Holy Church, the statute authorized sheriffs to be directed to hold such persons "in arrest and strong prison" until "they will justify them according to the law and reason of Holy Church." But at the very next session the Commons declared that they had never assented to this enactment and asked that it be declared void.<sup>17</sup> And to this the King gave his assent. Under Henry IV, however, the clergy succeeded in getting a much more drastic statute,<sup>18</sup> aimed especially at the Lollards, which not only forbade such heretical preaching but authorized the Diocesan to arrest any person "in this behalf defamed or evidently suspected"<sup>19</sup> and to imprison him until he canonically purged himself, and abjured the heretical opinions "according as the laws of the church

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15. *Id.* at 388 (III) (1368).

16. 2 Statutes of the Realm 25-26 (1382).

17. 3 Rotuli Parliamentorum 141, item 53.

18. 2 Statutes of the Realm 125 (2 Hen. IV c. 15, 1401).

19. *Id.* at 127.

do require,"<sup>20</sup> so that the "diocesan do openly and judicially proceed . . . and determine that same business according to the Canonical decrees within three months after the said arrest. . . ." <sup>21</sup> This statute was strengthened in 1414,<sup>22</sup> and provided for turning over to the ecclesiastical courts persons indicted for heresy. For a century and a third the lay authorities and courts cooperated with the ecclesiastical courts in the prosecution of heretics. Under Henry VIII the opposition to the oath *ex officio* again became vocal; and in 1533, in "An Act for punysshement of Heresy," it was specifically provided that "every person and persons being presented or indicted of [heresy] or duly accused or detected thereof by two lawful wytnesses at the leest to any Ordynaries of this Realme havynge power to examyne heresy, shall and may after every suche accusation or presentment and none otherwyse nor by any other meanes be cited convented arrested taken or apprehended by any the seid Ordynaries or any other the Kynge's mynisters and subjectes who soo ever." After being apprehended they were to be committed to answer "in open Courte and in an open place to their such accusation and presentmentis."<sup>23</sup> This clearly was designed to prohibit the oath *ex officio*. Six years later "An Act abolishing diversity in Opynions" specified the forbidden opinions, the teaching or holding of which was made punishable, and provided a detailed procedure for accusation, process and trial.<sup>24</sup> Under Mary, the statutes and practices of Henry VIII were repealed; those of Henry IV and the repudiated statute of Richard II were revived.

In the first year of the reign of Elizabeth all these measures of Mary were undone. An act was passed "restoring to the Crowne thauncyent Jurisdiction over the state, Ecclesiastical and Spiritual and abolysing all forreine Power repugnaunt to the same." In the most sweeping terms it united and annexed to the imperial crown "all such jurisdictions privileges, superiorities and preeminences spiritual and ecclesiastical as by any spiritual or ecclesiastical power or authority hath heretofore been or may lawfully be exercised or used." It authorized the Queen by letters patent to delegate to Commissioners her power and authority "to visit reform redress order correct and amend all such errors, heresies scisms abuses offences

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20. *Ibid.*

21. *Ibid.* The statute also provided that those who did not abjure should be turned over to the sheriff to be publicly burned, and is consequently commonly called "De Heretico Comburendo."

22. *Id.* at 181 (2 Henry V, c. 7, 1414).

23. 3 Statutes of the Realm 454, 455 (25 Henry VIII, c. 14, 1533).

24. *Id.* at 739, 741-742 (31 Henry VIII, c. 14, 1539).

contempts and enormities.”<sup>25</sup> In the earlier letters patent or commissions, nothing was said about the oath *ex officio*, but in 1583 the Commissioners, who came to be known, and to regard themselves, as the Court of High Commission, were specifically authorized to use this oath procedure.<sup>26</sup> Certainly this Court had jurisdiction over causes matrimonial and testamentary, and specifically over heresy as defined in the statutes of Henry VIII. To what extent could its Commissioners lawfully use this oath?

There can be no doubt that in the reign of Elizabeth the common law courts nullified the penalties imposed by the Commissioners upon accused persons for refusal to take the oath, but there is much doubt as to the reason for their action. In the famous case of *Burrowes* and others against the High Commission Courts,<sup>27</sup> Coke cites and comments upon three decisions<sup>28</sup> from the earlier years of the reign of Elizabeth. The High Commission had imprisoned Skrogges for refusal to answer under oath concerning title to an office, Hynde concerning usury, and Leigh concerning the hearing of masses. The common law court released each of them on habeas corpus, so Coke says, because “*nemo tenetur se ipsum prodere*.” As to the first two Coke’s statement differs from that of Dyer, who reports that the release was ordered because the petitioner “was a person in the court and a necessary member of it.” *Leigh’s Case*, Coke asserted, was not reported by Dyer in the printed book but in a “manuscript written with his own hand, which book I have . . .”; Leigh was an attorney of the Common Bench, the ecclesiastical judges committed him to the Fleet for refusal to answer them as to the hearing of masses, and the Common Bench issued a habeas corpus and upon the return, said: “*Quod nemo tenetur se ipsum prodere* and for this cause then delivered him.” In *Attorney General v. Mico*,<sup>29</sup> in resisting a bill for discovery, defendant’s counsel cited these cases and other statements by Coke, all indicating that the

25. 4 *Id.* at 350, 352 (1 Eliz. 1558-1559). In the quotation the spelling is modernized.

26. In *Caudry’s Case*, 5 Coke’s Reports viii (33 Eliz., ed. of 1777), it was resolved that this “was not a statute introductory of a new law, but declaratory of the old.”

27. 3 Bulstrode 48 (13 James I.).

28. *Scrogs Case*, reported as *Skrogges v. Coleshil*, Dyer 175a (1 & 2 Eliz.) (ed. of 1744); *Hyndes Case*, reported in a note as *Hind*, Dyer 175b (stated by Coke to have been decided in 10 Eliz.); and *Lee’s Case*, also called *Leigh’s Case* (18 Eliz.).

29. *Hardres* 137, 143 (1658). There are cases in the reign of James I where writs of prohibition were granted against examination under oath concerning criminal matters, though there was no doubt that the court was acting within its jurisdiction. See, e.g., *Spendlow v. Smith*, Hob. 84 (1615); *Latters v. Sussex*, Noy 151 (date uncertain).



maxim had been used as the basis for decision in Elizabeth's reign for the protection of defendants against disclosure under oath of matter which would subject them to penalty or forfeiture.

Wigmore insists that Coke's misstatement of the *Skrogges* and *Hyndes* cases is demonstrated by the report in *Dyer*, and that Coke was equally inaccurate as to *Leigh's* case. He intimates that Coke was substituting for the facts his wishful thinking, which first appears in his advocacy for the petitioners in *Collier* and *Collier* in the Common Bench in 1589<sup>30</sup> where he sought, and, according to two of the accounts, obtained a writ prohibiting the spiritual courts from examining them on charges of incontinency. The statement in *Croke* is that the prohibition was granted because "nemo tenetur prodere se ipsum"; that in *Moore*, "quia ils ne doyent eux mesmes prodere lou discredit ensue." Leonard ends his short report: "Et nemo tenetur se ipsum prodere: but the court would advise of it." Since these reports were first published in 1657, 1687, and 1688, respectively, Wigmore would doubtless urge that the reporters probably accepted Coke's erroneous interpretation. It is certain that in *Dr. Hunt's* case,<sup>31</sup> the King's Bench held it lawful for the spiritual court to put a person to his oath concerning incontinency "where the offence is first presented by two men."

It will be noted that all these cases involve the power of the church courts or High Commission to administer the oath or to punish for refusal to take it, and that in each case it does not appear that the person summoned had been formally charged with an offense. The spiritual court could not require him *se ipsum prodere*. In his first essay Wigmore says that *prodere* means "to disclose for the first time," "to reveal what was before unknown."<sup>32</sup> According to Harper's Latin Dictionary the word's primary meaning is "to give, put or bring forth" and its secondary meaning "to disclose, discover, betray." Such a translation as "discover" would justify Wigmore's interpretation and would harmonize the decisions before 1583, which prohibit the "ex officio" oath, and yet do not prohibit

30. Reported in 4 Leon. 194; Cro. Eliz. 201; Moore 906. Mrs. Maguire, referring to the assertion made by both Bentham and Wigmore, that Coke's use of "Nemo tenetur se ipsum prodere" is the first instance in which it is lifted from its accepted place in a single sentence, says that though this may be true as to its appearance in a law report, "there are many instances of its use earlier, even fifty years before," and gives citations to them. Maguire, *op. cit. supra* note 2, at 223-224. The unquestioned maxim was "Licet nemo tenetur seipsum prodere, tamen proditus per famam tenetur seipsum ostendere utrum possit suam innocentiam ostendere et seipsum purgare."

31. Cro. Eliz. 262 (1591).

32. 5 Harv. L. Rev. 84 (1891).

requiring a person formally accused to answer pertaining to matter within the jurisdiction of the court. All that can be safely asserted is that the common lawyers both in the second half of the 13th and all of the 14th century and under Henry VIII and Elizabeth resisted the inquisitorial procedure of the spiritual courts, whether Romish or English, and under Elizabeth began to base their opposition chiefly upon the principle that a person could not be compelled to furnish under oath answers to charges which had not been formally made and disclosed to him, except in causes testamentary and matrimonial. No doubt, there was some confusion between the attack on the power of the spiritual courts even to entertain certain causes and its power to institute proceedings by the *ex officio* oath. But there can equally be no doubt that to the common lawyers a system which required a person to furnish his own indictment from his own lips under oath was repugnant to the law of the land.

But what of the situation where a defendant after proper accusation was brought to trial? A reading of the early cases in Howell's *State Trials* makes it abundantly clear that both the judges in the common law courts and the accused proceeded on the theory that after pleading to the indictment, the accused could be asked and was required to answer directly incriminating questions. But as early as the 1640s, the accused began to claim, and the common law judges to concede, that a man on trial could not be compelled to answer<sup>33</sup> questions which would disclose his guilt. Freeborn John Lilburn seems to have been largely responsible for the innovation. After having been punished by the Star Chamber for his refusal to take the *ex officio* oath, he appealed to the Commons, which in 1640 voted his sentence "illegal, and against the liberty of the subject," and ordered him to be compensated.<sup>34</sup> In the same year both the Court of High Commission and the Court of Star Chamber were abolished, and ecclesiastical officials and tribunals were forbidden to administer any *ex officio* oath by which a man should be required to confess anything which would expose him to any censure, pain, penalty or punishment whatsoever.<sup>35</sup> In 1645 the House of Lords heard the petition of Lilburn and ordered his sentence to be totally vacated as "illegal, most unjust, and against the liberty of the subject, and law of the land, and Magna Charta, and unfit to continue upon record, &c.",<sup>36</sup> and in 1648 Lilburn was

33. See 8 Wig. *op. cit.* *supra* note 1, § 2250, n. 102, 103, 104.

34. 3 How. St. Tr. 1342 (1640). (The spelling of the name "Lilburn" varies in the Reports.)

35. 5 Statutes of the Realm 110-113.

36. 3 How. St. Tr. 1368 (1638).

granted £3000 in reparation.<sup>37</sup> While this case had to do only with the ex officio oath, the illegality of the procedure was declared to consist of its violation of the liberty of the subject, the law of the land and Magna Charta. In 1641 at the Trial of the Twelve Bishops, they declined to answer whether they had signed the treasonable petition, for the reason that they were not bound to accuse themselves.<sup>38</sup> Thus they used the language that Coke in the King's Bench had used without qualification in his opinions in the case of *Burrowes* and others against the High Commission Court while citing the decisions during Elizabeth's reign. In 1649 Lilburn was again on trial, this time for treason against the Commonwealth. While Lilburn was arguing that he should have counsel before being required to plead, he said to this effect: "Then, Sir, thus, by the Laws of England, I am not to answer to questions against or concerning myself." Lord Keble replied: "You shall not be compelled."<sup>39</sup> And when Penn and Mead were tried in 1670 for tumultuous assembly, Mead was asked whether he was present when Penn was speaking to the crowd. He replied: "It is a maxim in your own law, 'Nemo tenetur accusare seipsum', which if it be not true Latin, I am sure it is true English, 'That no man is bound to accuse himself.' And why dost thou offer to insnare me with such a question?" The recorder answered: "Sir, hold your tongue, I did not go about to insnare you."<sup>40</sup> In 1679 there are several cases where a witness is protected against incriminating answers.<sup>41</sup>

Thus it seems that beginning with 1641 the common law courts were at least occasionally applying to their own procedure at the trial the prohibition which they had previously placed upon the procedure of the church courts before formal accusation. Because these decisions followed so closely upon the abolition of the High Commission and the Star Chamber, Wigmore accepts Bentham's explanation that the reception of the maxim as generally applicable was due to the tendency to condemn generally anything and everything in the procedure of the ecclesiastical courts which affected the liberties of the subject. In sweeping away these hated tribunals, everything loosely thought of as characteristic of them had to go too. This may be good enough a guess, but it may also be suggested that, though in the recorded cases before the church courts these extraordinarily acute defendants made nice distinctions between

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37. *Ibid.*

38. 4 How. St. Tr. 63, 76 (1641).

39. *Id.* at 1292-1293.

40. 6 How. St. Tr. 951, 957-958 (1670).

41. See 8 Wigmore, *op. cit. supra* note 1, § 2250, n. 104.

being compelled to answer formal accusations and being made the subjects of fishing expeditions the purpose of which was to uncover heresies of themselves or their friends, the mass of the people who were affected made no such fine discriminations and thought of the principle as generally applicable. The references to the law of the land and Magna Charta indicate reliance upon rules applicable to all representatives of the Crown, whether ecclesiastical or temporal. And Coke's frequent citation of the maxim without limitation must have fostered this idea in the profession as well as among laymen. Whatever the explanation, the rule becomes established by 1700 as applicable to both defendants and witnesses in criminal trials in the common law courts.

As stated above, in 1658 when the Attorney General sought discovery in the Exchequer against Mico,<sup>42</sup> where defendant was charged with avoiding customs duties and bribing customs officers, defendant's counsel cited Coke and the cases in which Coke claimed that the decision was based on the privilege. In 1682 the equity court held good a plea to a bill for discovery "in order to the plaintiff's bringing an action on the case for damages" done by defendant's causing plaintiff's wines to be seized as French wines and thereafter relinquishing the prosecution. The plea was based on a statute imposing a penalty upon anyone guilty of such conduct.<sup>43</sup> In 1737 Lord Hardwicke in denying discovery in an action for rents and profits said that "there is no rule more established in equity than that a person shall not be obliged to discover what will subject him to a penalty or anything in the nature of a penalty.

"Under the rule, a man is not obliged to accuse himself, is implied that he is not to discover a disability in himself; . . ."<sup>44</sup> A little earlier he had recognized the applicability of the privilege,<sup>45</sup> and in later cases he treated it as established.<sup>46</sup> Although the refusal of the equity courts to grant discovery in these cases might have been based on supposed grounds of fairness and reluctance to require or even permit one to allege his own turpitude, it seems fair to conclude that by the middle of the eighteenth century they were giving full recognition to the privilege. The scarcity or non-existence of reported cases in which the privilege was applied in civil actions at common law may be explained by the fact that from the

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42. See note 29 *supra*.

43. *Bird v. Hardwicke*, 1 Vern. 109 (1682).

44. *Smith v. Read*, 1 Atk. 526, 527 (1737).

45. *Duncalf v. Blake*, 1 Atk. 52 (1737).

46. *Baker v. Pritchard*, 2 Atk. 387 (1742); *Harrison v. Southcote*, 1 Atk. 528, 2 Vesey 389 (1751).

early 1600s to the middle of the nineteenth century parties were disqualified as witnesses and so, at least after the middle of the 1600s, were interested persons.<sup>47</sup> Furthermore when the common law courts granted the privilege to witnesses in criminal proceedings, it is highly improbable that they would have denied it to witnesses in civil actions.

It may, therefore, be fairly stated that before the middle of the 1700s a man could not be required in England to accuse himself on oath in any proceeding before an official tribunal seeking information looking to a criminal prosecution, or before a magistrate investigating an accusation against him with or without oath, or under oath in a court of equity or under oath in a court of common law.

Did the privilege have more far-reaching operations? For answer we must look to other aspects of criminal procedure. First, the arraignment of the accused. He was required to identify himself by holding up his right hand or by expressly admitting that he was the person charged. Then he was asked whether he pleaded guilty or not guilty. After a plea of not guilty, he was asked how he would be tried and was expected to answer, "By God and my country." If he refused to plead or to give the required answer after pleading, and there was no question that he was physically and mentally able to speak, the penalty for his recalcitrance depended upon the grade of the offense of which he was accused. If treason or misdemeanor, he was treated as if he had pleaded guilty and was subject to the prescribed punishment. If felony, he could not be tried or convicted unless he pleaded, and, if his plea was not guilty, put himself upon the country. But his refusal to do so brought upon him the penalty of *peine forte et dure*.<sup>48</sup> The early penalty was *prison forte et dure*, which consisted of close confinement with a meagre allowance of bread on one day and of water on the next until consent to plead or death from starvation followed. *Peine* was later added to the confinement. There are recorded instances of its use in the fourteenth, fifteenth and sixteenth centuries.<sup>49</sup> Coke described it, as it was in the reign of James I.<sup>50</sup> At the Trial of Richard Weston

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47. 2 Wigmore, *op. cit. supra* note 1, § 575.

48. See 1 Pike, *A History of Crime in England*, 210-211, 387 (1873); 2 *id.* at 194-195 and 283-285 (1876); 1 Stephen, *History of Criminal Law* 297-301 (1883); Thayer, *Preliminary Treatise on Evidence* 70-81 (1898); 2 Hale, *Pleas of the Crown*, 314-321 (ed. of 1800).

49. Thayer, *op. cit. supra* note 48, at 75-77.

50. 2 How. St. Tr. 911, 914 (1615).

in 1615, charged with the murder of Sir Thomas Overbury, in urging Weston to put himself upon the country, Coke

"repeated the form of judgment given against such, (as refused to do so) the extremity and rigour whereof was expressed in these words, *onere, frigore et fame*. For the first, he was to receive his punishment by the law, to be extended, and then to have weights laid upon him, no more than he was able to bear, which were by little and little to be increased.

"For the second, that he was to be exposed in an open place, near to the prison, in the open air, being naked.

"And lastly, that he was to be preserved with the coarsest bread that could be got, and water out of the next sink or puddle to the place of execution, and that day he had water he should have no bread, and that day he had bread he should have no water; and in this torment he was to linger as long as nature could linger out, so that oftentimes men lived in that extremity eight or nine days: adding further, that as life left him, so judgment should find him."

*Major Strangeway's Case* in 1658 is a striking example. By this time it seems that in order to hasten the death of the victim a sharp stake or piece of wood was ordinarily placed under him. In *Strangeway's case* this was not done, but a part of the heavy weight was put over his heart and the attendants stood upon it, so that he died within a few minutes.<sup>51</sup> In 1726 *Burnworth*<sup>52</sup> refused to plead and was pressed for an hour and three quarters. The torture of bearing nearly four hundred pounds induced him to consent to plead not guilty. He was found guilty by a jury, and was hanged. According to the report of Chief Justice Kelyng, George Thorely at the Newgate sessions in October, 1664, refused to plead and "his two thumbs were tied together with whipcord, that the pain of that might compel him to plead, and he was sent away so tied, and a minister persuaded to go to him to persuade him; and an hour after he was brought again and pleaded. And this was said to be the constant practice at Newgate."<sup>53</sup> This was used as a preliminary to pressing in *Burnworth's Case*, and in 1734 it, combined with threats of pressing, induced John Durant to plead not guilty.<sup>54</sup> Not until 1772 was this barbaric practice abolished; the statute of 12 Geo. III provided that if a person stood mute on his arraignment of piracy or felony, he should be convicted and the court should award judgment and execution as if he had been convicted

51. 2 Pike, *op. cit. supra* note 48, at 194.

52. *Id.* at 283-284.

53. J. Kelyng 27 (1708). The spelling and capitalization are modernized. Thayer gives the name of the accused as Harley. Thayer, *op. cit. supra* note 48, at 77.

54. 2 Pike, *op. cit. supra* note 48, at 284-285, 638.

by verdict or confession. In 1827 standing mute in any criminal case was by statute of 7 and 8 Geo. IV made the equivalent of a plea of not guilty.<sup>55</sup>

Next, the preliminary hearing. Statutes enacted in 1554 and 1555, provided that when any person arrested for manslaughter or felony or suspicion thereof was brought before two justices of the peace, they should examine him and the persons who brought him concerning the fact and circumstances, and have put in writing so much of the examinations as was material to prove the offense.<sup>56</sup> It seems reasonably clear from the records in Howell's State Trials that a justice of the peace who had learned that a crime had been committed, frequently before any arrest had been made examined, on his own initiative, persons who he believed had information concerning it and the person whom he suspected of having committed it. The questions were directed to the particular offense, and the answers given often led to the arrest of the person questioned. Two justices conducted the formal examination after arrest. There was no thought of advising the accused that he need not answer or warning him that what he said might be used against him. The justice was often the chief witness at the trial of the accused and either used his record of the examination as the basis for his answers or read the record in evidence for the prosecution.<sup>57</sup> It was not until the enactment of Sir John Jervis's Act in 1848 that the accused was given protection at the preliminary hearing. By its terms he had the right to be present at the examination of the witnesses and to cross-examine them; he was not to be questioned but was permitted to make a statement after being warned that he need say nothing and that whatever he said would be recorded and might be given in evidence against him.<sup>58</sup>

Finally, as to confessions obtained by coercion. While all the English commentators insist that the law of England has always forbidden the use of torture to secure a confession and that this was specifically so declared in the answer of all the judges to the King in *Felton's Case*,<sup>59</sup> there can be no doubt that by direction of the Crown or by order of the Privy Council, torture was frequently

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55. See Thayer, *op. cit. supra* note 48, at 78 n. 1; 1 Holdsworth, *History of English Law* 327 (6 ed. 1938).

56. Statutes of 1 and 2 Ph. & M. c. 13 and of 2 and 3 Ph. & M. c. 10.

57. See Trial of Col. Turner and others, 6 How. St. Tr. 565, 572-576, 617-619 (1664); Trial of George Borosky and others, 9 *id.* at 1, 22-27, 120-123 (1682). (This case is ordinarily known as the Trial of Count Coningsmark.)

58. See 1 Stephen, *op. cit. supra* note 48, at 216-225.

59. Jardine, *Use of Torture in the Criminal Law of England* 6-12 (1837), (hereafter referred to as Jardine).

used in the reigns of Edward VI, Mary, Elizabeth, James I and Charles I, and confessions thereby obtained were made the basis of convictions. MacNally quotes from "King James's Premonition" a statement that torture "was never used but in cases of high treason,"<sup>60</sup> but Jardine gives instances of its having been ordered in cases of murder, robbery, embezzlement, horse stealing and some unspecified offenses. He found no case of torture after 1640; but in the *Trial of Thomas Tonge*<sup>61</sup> for high treason in 1662 Sir Orlando Bridgman told Tonge that he had against him four witnesses and his own examination and confession. Tonge replied, "I confess I did confess it in the tower, being threatened with the rack."

It will be remembered that beginning with the *Collier Case*, Coke insisted that no one should be compelled to accuse himself. It is interesting to note that the Privy Council in December, 1596, and February, 1597, addressed a letter to Coke, Francis Bacon and two others directing them to use in the one case "manackles and torture" and in the other "manacles or the torture of the racke" to force certain prisoners to tell the truth about the circumstances of the offenses with which they were charged and particularly the identity of others involved.<sup>62</sup> In 1603, a mandate addressed to Coke and others required them to examine one Phillip Maye, and "if he shall not deale playnly and truly to discover the depth of his knowledge, mynde, and conference in all these matters, then you shall by virtue hereof put him to the manacles, or such other torture as is used in the Tower, that he may be inforced to reveale the uttermost of his knowledge in any practise, purpose, or intent against His Highness."<sup>63</sup> As to this, Jardine says: "The circumstances that this examination bears date the same day as the warrant,—that it is executed and signed by the same persons to whom the warrant is directed, and that the whole of it is in the handwriting of the Attorney-general, furnish convincing evidence that this was one of those instances in which Sir Edward Coke personally conducted an examination by torture."<sup>64</sup>

*Tonge's Case* indicates that there was no disposition to reject a confession obtained by threats of torture as late as 1662; and there seems to be no indication in the reported trials of objections to confessions on the ground that they were improperly obtained

60. MacNally, *Rules of Evidence on Pleas of the Crown* 276 (1802).

61. 6 How. St. Tr. 225, 259 (1662).

62. Jardine, No. 44, p. 99; No. 45, p. 100.

63. *Id.* No. 50, p. 105.

64. *Id.* at 46-47.



until about the middle of the eighteenth century. At the *Trial of Francis Francia*<sup>65</sup> in 1717, the defendant insisted that Lord Townshend had paid him five guineas to induce him to sign the statement offered against him and that one Buckley, whom Lord Townshend had sent to him in prison, told him that he must swear for the government right or wrong if he would avoid punishment for high treason. There is no indication that even had this been the truth, it would have had any effect except upon the weight to be given to the confession. That the accused at times had the advice of friends not to answer harmful questions at the preliminary hearing appears as early as 1729 in the *Trial of William Hales and Thomas Kinnersley*<sup>66</sup> for forgery. But evidence of this incident was received without objection. In 1741 when Matthew Mahony was on trial in Bristol for the murder of Sir John Goodere,<sup>67</sup> his examination taken before the Mayor was offered in evidence. Thereupon the following occurred.

Q. Did you see the prisoner Mahony sign it in his (the Mayor's) presence?

A. Yes, Sir.

Q. Did he do it voluntarily?

A. He did.

Q. Did you see Mr. Mayor sign that examination?

A. Yes, I did.

Q. Then I desire it may be read.

Mr. Recorder: Read the Examination.

Charles White<sup>68</sup> was tried separately for the same murder. When his examination before the mayor was offered, the question, whether he had signed it voluntarily, was not asked, whereupon counsel for White said:

"It is opened by Mr. Vernon, that this Examination contains

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65. 15 How. St. Tr. 897, 917, 919, 985, 986 (1717). See also *Trial of Edward Arnold*, 16 *id.* at 695, 714, 758 (1724), where the magistrate testified that he got a statement from the accused only with a great deal of difficulty and persuasion.

66. 17 How. St. Tr. 229, 235 (1727); *id.* at 267, 273. In the first case the magistrate testified that after Kinnersley had answered some questions with reference to one note, he "seemed ready to make an ample confession" but was stopped by "a person there." The magistrate thought this not becoming. In the second case, one Mitford told the accused to say nothing about the second note.

67. 17 *Id.* at 1003, 1053 (1741). (The names of the examiner and witness are omitted.)

68. *Id.* at 1079, 1085.

the prisoner's confession of the fact. I would ask Mr. Britten, was the confession voluntarily made or not? For if it was not voluntarily, it ought not to be read."

"Mr. Recorder. That is an improper question, unless the prisoner had insisted, and made it part of his case, that his confession was extorted by threats, or drawn from him by promises; in that case, indeed, it would have been proper for us to enquire by what means the confession was procured: but as the prisoner alleges nothing of that kind, I will not suffer a question to be asked the clerk, which carries in it a reflection on the magistrate before whom the Examination was taken. Let it be read."

In *Rudd's Case*<sup>69</sup> in 1775, on application for release on bail, counsel argued that the prisoner had been induced by "promises and assurances to answer to an examination, and to swear to it on oath." In holding the objection irrelevant Lord Mansfield said: "The instance has frequently happened, of persons having made confessions under threats or promises: the consequence as frequently has been, that such examination and confessions have not been made use of against them on their trial." Eight years later the accused argued that an offer in evidence of property found as the result of a confession obtained by promises should be rejected, "for otherwise the faith which the prosecutor had pledged would be violated."<sup>70</sup> The court answered that this idea was novel and repugnant to the general principles of the criminal law, that the admissibility of confessions depended on whether they were entitled to credit. "A free and voluntary confession is deserving of the highest credit, . . . but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected."<sup>71</sup>

From this review of the English authorities the following conclusions, it is submitted, may be fairly drawn.

1. At no time from the end of the fifteenth century to the commencement of the nineteenth century was there any notion that an accused had a privilege not to plead at his arraignment for trial for any criminal offense. He was either subject to torture to compel him to plead or subject to punishment as upon a plea of guilty or conviction by a jury.

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69. Leach's Crown Cas. 115, 117-18 (4th ed. 1775).

70. Warickshall's Case, *id.* at 263 (1783).

71. *Id.* at 263-264. The cases cited in these notes 67-71 are all to be found in Wigmore's discussion in §§ 818 and 819. His deductions from them and some of the earlier authorities are somewhat different from those in the text.

2. From the middle of the sixteenth century to the middle of the nineteenth, the accused was subject to a preliminary examination before committing magistrates and expected to answer. He was not warned that he need not answer; and, indeed, any refusal to answer, whether of his own initiative or on advice of another, was reported and stated by the magistrate in his testimony at the trial.

3. Up to the middle of the seventeenth century torture was used to extort confessions, and there was no serious contention that such extorted confessions were inadmissible against the victim. Even Coke, the great advocate of the applicability of the privilege against self-incrimination to proceedings in the common law courts seems never to have regarded it as having any application to extorted confessions or to proceedings before the committing magistrates.

4. As early as the second decade of the eighteenth century, the accused were making objections to the use of confessions secured by threats or promises by persons in authority. It is not clear whether the objection went only to the weight of such evidence. By 1741 the idea that such a confession ought not to be received over the objection of the accused pretty clearly appears in the Cases of *Mahony* and *White*.<sup>72</sup> Certainly the Recorder's ready statement as to the effect of threats or promises indicates an accepted rule rather than a novelty; and Lord Mansfield's dictum some thirty years later declares the rejection of the evidence to be as frequent as the use of the improper means to secure it. By 1783 not only is the rule recognized but there is debate as to the theory on which evidence of the confession is rejected. But there is nothing in the reports to suggest that the theory has its roots in the privilege against self-incrimination. And so far as the cases reveal, the privilege, as such, seems to have been given effect only in judicial proceedings, including the preliminary examinations by authorized magistrates.

#### B. In the Colonies

The available colonial precedents are few, and only tentative conclusions are warranted. It would have been strange if the Colonists had not brought to America the ideas and ideals which they had cherished in England. As to torture, condemnation of its use to compel a confession appears in the Massachusetts Body of Liberties of 1641; and it seems clear that it was not sanctioned (or

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72. See notes 67 and 68 *supra*.

used in the Colonies) after it had disappeared in the mother country.<sup>73</sup>

To the preliminary examination of an accused by the committing magistrates there appears to have been no objection. The English Colonists must have been familiar with its use as provided for in the statute of William and Mary, for it was an everyday occurrence, and no one thought of challenging its validity. In like manner it was common practice for the court at the trial to question and even argue with the accused. The conduct of the Massachusetts judges in this respect in the *Trials of Anne Hutchinson and John Wheelwright* in 1637<sup>74</sup> could not have been regarded as extraordinary. And the keen and doughty defendants were not one whit less skillful than the best of their prototypes in similar situations in England. They insisted on knowing who were their accusers and what were the charges against them. When Wheelwright was told that these ordinary requisites were not necessary in his case because the questions concerned a sermon which he acknowledged and the court might therefore proceed "ex officio," "great exception was taken, as if the Court intended the course of the High Commission, &c. It was answered that the word *ex officio* was very safe and proper, . . . seeing the Court did not examine him by any compulsory means, as by oath, imprisonment, or the like. . . ." Again, after he had consented to be questioned, when he was asked about a matter not directly connected with the sermon, and he refused to answer, "some cried out, that the Court went about to ensnare him, and to make him to accuse himself. . . ."<sup>75</sup>

It is likewise reasonably clear that the English procedure for

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73. See Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 Va. L. Rev. 763, 775-783 (1935). The exception in § 45 of the Mass. Body of Liberties dealt with torture to compel a convict to disclose his confederates where their existence was very apparent. For many helpful suggestions and references dealing with the law in the Colonies, I am indebted to my colleague, Professor Mark Howe.

74. See 1 Chandler's Criminal Trials 3 (1841).

75. Antinomianism in the Colony of Massachusetts Bay, 1636-1638, Edited by Charles Frances Adams, 194, 195 (Boston, 1894). There can be little doubt that the struggle of Englishmen against extorting confessions by oath ex officio or by torture was being duplicated in America. See the answers of all three ministers in 1642 to the questions submitted by Bellingham to Governor Winthrop and by him referred to the ministers. 3 Massachusetts Historical Society Collections 389-397 (4th series, 1856). It is difficult to imagine how Wigmore in his third edition could cite these letters as supporting his statement (8 Wigmore, p. 301), that as late as 1685 the Colonies "formally sanctioned the ecclesiastical rule by which the inquisitorial oath was allowed," especially since he was obviously familiar with Mr. Pittman's article in which the contrary was demonstrated by direct quotation.

compelling an accused, charged with a felony other than treason, to plead and put himself upon the country was recognized in the Colonies. In 1639 Dorothy Talbye "was so possessed with Satan, that he persuaded her . . . to break the neck of her own child, that she might free it from future misery. This she confessed upon her apprehension; yet, at her arraignment, she stood mute a good space, till the governour told her she would be pressed to death, and then she confessed the indictment."<sup>76</sup> In 1692 Giles Corey charged with witchcraft pleaded not guilty; but, because he had seen the juries convict all others so charged, he refused to put himself upon the country. He was pressed to death.<sup>77</sup>

Goebel and Naughton<sup>78</sup> think that *peine forte* did not become a part of the law of New York because the judges in the *Case of Jacob Leisler* "saw fit to employ a modification of it on that unhappy man, and this one experience with the great mercies of the *peine* was sufficient." They quote from the record, showing that the president of the court advised him to plead; when he refused and asked leave to consult counsel, the prosecutor prayed judgment. Leisler was then "ordered tyed up and putt in irons in order to his suffering the Judgmt of the law to be given by this court. . . ." There is nothing to indicate the meaning of "tyed up." It is clear, however, that this harsh treatment was not continued; and certainly there was no need of it to induce a plea, for Leisler was charged with treason, and refusal to plead to either treason or misdemeanor was the equivalent of a plea of guilty. The contemporary records make it clear that both Leisler and Milbourne continued to stand mute and were convicted as mutes.<sup>79</sup> Consequently

76. 1 Winthrop, *History of New England* 297, \*336 (ed. of 1853).

77. Burr, *Narratives of the Witchcraft Cases* 367, 393 (1914). This portion of the book reprints material from *More Wonders of the Invisible World* by Robert Calef printed in London in 1700. Calef asserts: "In pressing his Tongue being prest out of his Mouth, the Sheriff with his Cane forced it in again, when he was dying. He was the first in New-England that was ever prest to Death." Calef's book was called "A Volumn of invented and notorious lies" by Cotton Mather before it was sent to London to be printed. When it appeared, President Increase Mather "ordered the wicked book to be burnt in the college yard."

78. *Law Enforcement in Colonial New York* 582 (1944).

79. 2 *Documentary History of New York* 381, 382, 386, 425, 434 (arranged under the direction of the Hon. Christopher Morgan, Secretary of State, by E. B. O'Callaghan, Albany, 1849). "... the Major . . . brought Leisler and his Councill. to the Govr. at the City hall they being taken in actual rebellion the Govr. . . . ordered a Commission of Oyer & Terminer to be Issued out for their Legall tryall where two were acquitted by their country viz: Delanoy & Edsall, six Convict by their Countrey, and two Leslier & Millbourn Condemned as mute. . . ." A similar statement is made by Major Ingoldsby & Council to the Lords of Trade under date of July 29, 1691. And in A Letter from A Gentleman of the City of New York To

if Leisler was treated any differently from the ordinary prisoner convicted of treason and awaiting sentence, and the the treatment was to induce him to take the benefit of a trial by jury, this "modified *peine*" may have been in the nature of a favor. Moreover, the authors report the *Case of Elizabeth Horton* in 1723 wherein the usual English procedure was followed. She stood mute and a jury was empanelled to determine whether she stood mute through obstinacy or malice or as a result of Divine visitation. The jury found that she was mad both then and at the time of the offense.<sup>80</sup>

Whether Maryland accepted this procedure is not clear. There is a record of conviction in 1668 of an Indian and a negro upon their standing mute. The Indian was convicted of murder; and the negro for killing his mistress. This latter was petit treason. An Act of 1737 talks of conviction by standing mute. In 1809 a statute directed the courts to proceed to trial of persons standing mute as if they had pleaded not guilty.<sup>81</sup> In the absence of further evidence, it might well be concluded that until 1809 an accused who refused to plead was treated no better in Maryland than in England.

That the English practice was regarded as generally applicable in the absence of legislation is a reasonable deduction from *United States v. Hare*.<sup>82</sup> Upon arraignment on an indictment for robbery of the mail by use of dangerous weapons—an offense punishable by death—defendants refused to plead. The argument of counsel was directed to the question whether the court must follow the English law as it was before the statute of 12 Geo. III, and order an inquest by jury as to whether defendants stood mute *ex visitatione Dei* or *ex malitia*. The Court held that (a) the Act of Congress of 1790,<sup>83</sup> in so far as it provided that if defendant stood mute

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Another, printed in pamphlet form in 1698 it is said concerning Leisler and Milborne: "After several hearings as mutes, [they] were found guilty of High Treason and Murder & executed Accordingly." Governor Sloughter under date of May 7, 1691, forwarded with his approval a report of the Leisler affair in which the following occurs: "Leyseler and Milborne did shew great stubbornnes upon their arraignment and were mute; whereupon they were condemned." See 3 Documents Relating to the Colonial History of the State of New York 762, 766 (1853).

80. Goebel and Naughton, *op. cit. supra* note 78, at 583.

81. See Kilty, English Statutes (applicable in Maryland), 17 (1811). This is in comment on the inapplicability of Chap. 12 of the Statute of Westminster I.

82. Fed. Cas. No. 15,304, 2 Wheeler Cr. Cas. 283 (D. Md., 1818). The act of 1790 was not by its terms applicable to the case at bar.

83. "An Act for the Punishment of certain Crimes against the United States," 1 Stat. 112.

when arraigned for an offense punishable by death, trial should proceed as if he had pleaded not guilty, and (b) other federal statutes, and (c) the whole structure of federal criminal law, were persuasive that the English rule was not applicable; and if the Maryland rule was to apply, the precedents indicated that standing mute was the equivalent of a conviction before the statute of 1809. As late as 1881, a defendant standing mute on arraignment on an information for mailing a lottery circular, seriously insisted that the judge had no authority to enter a plea of not guilty for him. The court followed the *Hare* case, and said that there was no distinction between an accusation by indictment and one by information.<sup>84</sup>

It should be noted that neither in England, nor in the Colonies, nor in these federal cases is there any contention or intimation that either the common law procedure for compelling a plea or the statutory substitute in any way impinges upon the privilege against self-incrimination. But in this connection it is interesting to observe that in Massachusetts as early as 1642 the relation between compelling answers by torture or by the oath *ex officio* and the maxim, "Nemo tenetur prodere seipsum" was appreciated.<sup>85</sup>

The Colonial cases, like those in England, involved only official inquiries by magistrates and actual trials. In such situations the privilege against self-incrimination must have been firmly established in most of the Colonies before 1789, for six of them had embodied it in their fundamental laws.<sup>86</sup> The Maryland provision of 1776 was so qualified that it could be practically nullified by the legislature.<sup>87</sup> The New York Constitution of 1777 contained no bill or declaration of rights. Goebel and Naughton, after describing the procedure in cases where improperly induced confessions were admitted and where the court questioned the accused without any warning or apparently any recognition of a right to refuse to answer incriminating questions, declare that "the conclusion is inescapable that so far as New York Province was concerned there was no attempt made to privilege a defendant or to treat his testimony as incompetent. . . . This indifference to any privilege against self-

84. *United States v. Borger*, 7 Fed. 193 (S.D. N.Y., 1881).

85. See the letters referred to in note 75 *supra*. Bellingham's question was, "How farr a magistrate may extracte a confession from a delinquent, to accuse him selfe of a capitall crime, seeing Nemo tenetur prodere seipsum." 3 Mass. Hist. Soc. Collections 390 (4th series 1833); *cf. Id.* at 391 and 396.

86. These in chronological order were Virginia, Pennsylvania, North Carolina, Vermont, Massachusetts, and New Hampshire. See respectively 2 Poore, *United States Charters and Constitutions* 1909, 1541-1542, 1409, 1860, 1 *id.* at 958, 2 *id.* at 1282 (2d ed. 1878).

87. 1 *Id.* at 818.

incrimination probably embraced witnesses generally although we have found but one case. . . . Whatever may be the colonial background of the later constitutional protection, it derives, as far as New York is concerned, from a very tardy realization that such protection was desirable."<sup>88</sup> But when New York ratified the United States Constitution, it proposed an amendment which among other things provided that in all criminal prosecution the accused should not be compelled to give evidence against himself.<sup>89</sup> Does this suggest that the conclusion of our authors may be escapable, and that the New York Colonial precedents, like the English, indicate only that there was no necessity of informing an accused of his right not to answer incriminating questions, and cannot be regarded as decisions that he could be compelled to answer under oath or by torture? Rhode Island proposed an amendment similar to that of New York, and it would be rash to infer that she did not recognize the privilege simply because it was not first definitely made a fundamental law until 1846.<sup>90</sup> Although Connecticut had no constitutional provision until 1818, early Colonial statutes forbade the use of torture to force a confession of crime.<sup>91</sup> And while there seems to have been a general tendency to confuse the privilege with the prohibition of torture, the Fifth Amendment to the United States Constitution specifically covered the privilege.

The language of the Constitutional provisions is not as broad as the English precedents would have warranted. In six of the Colonial Constitutions preceding 1789 the provision forbade compelling a person to give evidence against himself in criminal prosecutions; in Maryland the prohibition applied "in a common court of law or in any other court." The Fifth Amendment prohibits compelling him to be a witness against himself in any criminal case. If this language were to be construed as fixing the limits of the privilege without regard to the existing precedents, it would be difficult to contend that it could be legitimately claimed in a civil action in law or equity, or in any proceeding which was not to be used as a foundation for a criminal prosecution.

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88. Goebel and Naughton, *op. cit. supra* note 78, at 659. The first New York constitutional provision against self-incrimination is found in section 6 of Article 1 of the Constitution of 1846. It copies the pertinent language from the Fifth Amendment of the United States Constitution. 2 Poore, *op. cit. supra* note 86, at 1351.

89. See *Twining v. New Jersey*, 211 U. S. 78, 109 (1908).

90. See *ibid.* Delaware had no constitutional prohibition against self-incrimination until 1792; South Carolina and Georgia until after the Civil War; New Jersey still has none.

91. See Pittman, *op. cit. supra* note 73, at 779, 781.



## II. SOME CONTEMPORARY PROBLEMS

A. *Withdrawn Plea of Guilty*

Even during the period when the accused was compelled to plead to escape death by torture or judgment of conviction, a judicial confession would not be entered of record as a plea of guilty if the court believed it to be the result of duress or to be due to a mistake as to the legal effect of admitted conduct. And where a defendant stated the facts for the advice of the court, even though they constituted the commission of a felony, he might be permitted to plead not guilty and put himself upon the country.<sup>92</sup> There is no indication in the early treatise of Hale (1680) or that of Hawkins (1716), both of whom accept the authority of Staundford, as to whether the jury was informed of the confession or statement of the accused. Certainly there is not the slightest suggestion or intimation that the conduct of the accused upon his arraignment ought not to be made known to the jury or that the privilege against self-incrimination had any application. Nothing can be clearer than that an accused's refusal to plead to a charge of misdemeanor or treason furnished the basis for an inference of guilt, and indeed, a conclusive inference. And there was no hesitation in using torture to force a plea from him where the charge was felony. A plea of guilty would have been as welcome as a plea of not guilty, probably more welcome, for not only did the accused have to plead, but where he pleaded not guilty, he had also to put himself upon the country. And there is not even the remotest intimation that the 19th century legislation, which made standing mute upon arraignment on any charge the equivalent of a plea of guilty, was an encroachment upon the privilege against self-incrimination.

The conduct of criminal trials in England in the 17th and 18th centuries with the numerous colloquies between the court and the accused, and the settled practice of receiving against the accused his admissions and confessions made to the examining magistrates (see 3 Wig. § 848) demonstrate that, while the accused could not be compelled to answer criminating questions, he had no right to be warned that he need not answer, and his answers were constantly and consistently used against him. Of course, he was incompetent as a witness; but his incompetency was not grounded upon the privilege against self-incrimination, nor did the interpretation put upon his conduct at arraignment have any relation to the privilege.

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92. Staundford, *Pleas of the Crown*, book 2, c. 51 (1567).

It was not until 1942 that any connection between the privilege and the plea at arraignment was judicially recognized.<sup>93</sup> Mr. Justice Rutledge, speaking for the Court of Appeals of the District of Columbia, felt called upon to justify the decision of the Supreme Court in the *Kercheval* case<sup>94</sup> upon a ground which had never occurred to that august tribunal. It had held evidence of a withdrawn plea of guilty inadmissible because its use against defendant at the trial would be inconsistent with the judge's determination that defendant was entitled to a trial. Judge Swan's reasoning, that since the judge had found it unfair to hold the accused to his plea of guilty, it would be equally unfair to use it against him as an admission,<sup>95</sup> was deemed likewise superficial. The real reason was that to make such use of it would violate his privilege against self-incrimination. While the court has unquestioned power to demand that defendant plead, "the plea is not evidence. . . . When it is 'not guilty', it has no effect as testimony or as evidence in behalf of the accused. If he wishes his denial to be effective as evidence, he must make it as such from the witness stand."<sup>96</sup> True enough, but what has all this to do with privilege against self-incrimination? It may be that if the plea of "not guilty" is not evidence for the defendant, a plea of guilty ought not be evidence for the prosecution. But this notion of reciprocity or mutuality, if applied generally, would exclude all admissions and confessions for the reason that self-serving statements by a party to the action are everywhere rejected when offered in his behalf. "What is more to the point, the plea is not demanded or made with intention that it be testimonial or evidentiary. It is rather a formal criminal pleading, a waiver of trial and defense, a submission without contest. It does not create, it dispenses with evidence. Too often in minor offenses, and perhaps occasionally in major ones, it is made to avoid contest."<sup>97</sup> Hitherto, it has never been supposed that an admission was inadmissible against the admitter because he did not realize that it might later perform the function of evidence or might be used as evidence against him. Though such a consideration may be pertinent to a declaration against interest, it has no application to an admission. Indeed, a statement that was highly self-serving when made is receivable in evidence against the party making it wherever relevant. As to pleading guilty "to avoid contest," if this refers to a

93. *Wood v. United States*, 128 F. 2d 265 (D.C. Cir. 1942).

94. *Kercheval v. United States*, 274 U. S. 220 (1927).

95. *United States v. Adelman*, 107 F. 2d 497, 499 (2d Cir. 1939).

96. *Wood v. United States*, 128 F. 2d 265, 273 (D.C. Cir. 1942).

97. *Id.* at 273, 274.

compromise, the evidence may be inadmissible if there is a public policy to encourage compromises with persons charged with crime, or if the offer to compromise is considered not as a statement of a fact but merely as a conditional concession.

If the plea is to be used as evidence, then the court has no power to demand it. "The demand forces the defendant to commit himself squarely on the issue of his guilt. . . . There is no room to hedge or dodge. Standing mute in legal effect pleads not guilty. But as evidence it would carry the danger of silence when innocence requires speech."<sup>98</sup> Of course, that was exactly the effect of standing mute to a charge of treason; and no English court ever dreamed that this was a violation of the privilege. But just how is the defendant forced to commit himself on the issue, if he may stand mute? How can standing mute carry any danger when it is the legal equivalent of a plea of not guilty? What defendant who pleads guilty, otherwise than by way of compromise, ever supposes that he is not saying that he did the act charged but is merely waiving trial? And if any defendant has so pleaded with that understanding, is it to be taken for granted that the same is true of all defendants? Of course, the language of the Fifth Amendment can be construed to cover a withdrawn plea of guilty or a plea of guilty at the preliminary hearing which is repudiated at the trial. It can with equal facility be construed as prohibiting no more than the calling of defendant to the stand as a witness at the trial. But, heretofore, it has been supposed that the words were to be interpreted reasonably in view of accepted common law procedure.

The problem which Mr. Justice Rutledge had to solve concerned not a withdrawn plea of guilty but a plea of guilty before a committing magistrate. He was confronted with the decision in the *Kercheval* case and with a multitude of authorities holding admissible evidence of a plea of guilty made to the committing magistrate.<sup>99</sup> In order to disregard these cases and the opinions distinguishing them from the *Kercheval* case, he turned to the Constitutional privilege. One can sympathize with his dissatisfaction with a rule that rejects a withdrawn plea of guilty made at arraignment, where the accused is afforded every protection against misunderstanding, and admits a repudiated plea of guilty made at the preliminary hearing, where he may be without counsel and where the effect of his action may not be fully explained to him. If

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98. *Id.* at 274.

99. See the cases collected in 141 A. L. R. 1318, 1335 (1942) showing almost uniform holdings in the absence of statutes.

the object of a trial is the ascertainment of the truth, it is difficult to see how either can be rejected. Perhaps under our adversary system certain rules of good sportsmanship may be appropriate; but certainly they should not by implication be written into the Constitution by judicial decision at this late date.<sup>100</sup>

### B. *Confessions Coerced by Police*

In his effort to explain the error of the courts in adopting the generally accepted rule admitting evidence of a plea of guilty before a committing magistrate, Mr. Justice Rutledge pointed out that they had looked only to the rules governing admissibility of confession and had neglected to consider the applicability of the privilege. While he overlooked some essential features of the history of the privilege and mistakenly analogized the examination of the accused by ecclesiastical courts under the *ex officio* oath to the examination without oath before committing magistrates, he laid great emphasis upon the differences between the objective of the privilege and that of the rule governing confessions. He implied, if he did not expressly assert, that the chief, if not the sole, function of the privilege is to stand guard "against the ancient abuse of judicial inquisition," to protect "against the force of the court itself." The rule regarding confessions "fills no need for checking abuses of *judicial* inquisition." It excludes "untrustworthy communications"; "protects against extrajudicial physical and moral forces, applied where the privilege has no effect," and excludes "evidence so squeezed out because it has no value as proof." The privilege applies regardless of duress. It comes into play when the question is asked. "It excludes response regardless of its probative value."<sup>101</sup>

The inference from his discussion and his citation of Wigmore<sup>102</sup> is that the privilege has no application to inquisitions by the police. If so, this is most unfortunate. The function which the police have assumed in interrogating an accused is exactly that of the early committing magistrates, and the opportunities for imposition and abuse are fraught with much greater danger. As interpreted by Wigmore and by many, if not the majority, of state courts, the rule excluding confessions applies only to statements conceding the existence of all the elements of a punishable offense. It has no

100. Mr. Justice Rutledge adhered to his view in the *Wood* case, after his elevation to the Supreme Court. See his dissenting opinion in *Canizio v. New York*, 327 U. S. 82, 91 (1946).

101. *Wood v. United States*, 128 F. 2d 265, 268 (D.C. Cir. 1942).

102. 8 Wigmore, *op. cit. supra* note 1, § 2266.

effect to exclude coerced admissions of facts from which a trier might reasonably find guilt. The privilege, on the other hand, covers statements which disclose facts merely tending to show guilt. Investigation by the police is not judicial, but when it consists of an examination of an accused, it is quite as much an official proceeding as the early English preliminary hearing before a magistrate, and it has none of the safeguards of a judicial proceeding. If the historical confines of the privilege are to be broadened, this surely is an area that needs inclusion for reasons infinitely more compelling than those applicable to the arraignment.

Only a year before the *Wood* case, a dictum of the same court, speaking through Mr. Justice Edgerton, declared that the use of an extorted confession violated the privilege as embodied in the Fifth Amendment.<sup>103</sup> The opinions of state courts likewise reveal conflicting views.<sup>104</sup> Unfortunately none of them gives the problem thorough consideration. It must be conceded that all of the decisions admitting coerced statements of incriminating facts not amounting to a confession assume that the privilege is inapplicable, as does the constant recognition of the accepted police practice which, in the absence of statute, does not require that the accused be warned he need not answer in situations where, if the proceeding were judicial, the accused need not testify at all.<sup>105</sup> On the other hand, all the authorities dealing with the validity of statutes requiring reports to the police and the keeping of records of various occupational activities, as well as those passing upon the admissibility of evidence obtained by physical and mental examination of an accused by the police or under their direction, proceed upon the theory that the constitutional privilege furnishes protection against inquiries by the police. The conflict in the latter group arises from differences of opinion as to whether the privilege is confined to testimonial conduct; in the former, as to whether engaging in the activity justifies the imposition of the applicable condition upon

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103. *Bullock v. United States*, 122 F. 2d 213 (D.C. Cir. 1941).

104. *People v. Fox*, 319 Ill. 606, 150 N. E. 347 (1926); *People v. Owen*, 154 Mich. 571, 118 N. W. 590 (1908); *Owen v. Commonwealth*, 186 Va. 689, 43 S. E. 2d 895, 898 (1947), agreeing with *Wigmore*. *People v. Simmons*, 28 Cal. 2d 699, 716, 719, 720, 172 P. 2d 18 (1946); *People v. Shroyer*, 336 Ill. 324, 168 N. E. 337 (1929); *Matter of Schmidt v. District Attorney*, 255 App. Div. 353, 357, 8 N. Y. S. 2d 787 (4th Dep't 1938). *Contra: Abston v. State*, 139 Tex. Cr. 416, 417, 141 S. W. 2d 337 (1940).

105. See, e.g., *State ex rel. Poach v. Sly*, 63 S. D. 162, 257 N. W. 113 (1934); *State v. Allison*, 116 Mont. 352, 153 P. 2d 141 (1944); *O'Connell v. United States*, 40 F. 2d 201 (2d Cir. 1930).

the privilege of so doing or constitutes a waiver of the constitutional privilege. The Supreme Judicial Court of Massachusetts has never considered the privilege as confined to judicial investigations.<sup>106</sup> In the *Prince* case<sup>107</sup> the Massachusetts Court reversed a conviction of a defendant charged with having refused, in violation of a statute regulating the labor of minors, to give a school attendance officer the name of a minor in defendant's custody who, in defendant's presence, was offering a magazine for sale on a city street. Mr. Justice Qua observed: "The supervisor of attendance was in effect asking the defendant to help him secure the Commonwealth's principal witness in order to prosecute the defendant. If the defendant can be convicted for not answering such a question, why could not a statute be enacted in effect requiring every person suspected of crime to furnish the police a list of all the witnesses whose testimony would convict him?"<sup>108</sup>

Indeed, Mr. Wigmore himself declares that the protection of the privilege "extends to *all manner of proceedings* in which testimony is to be taken, whether litigious or not, and whether 'ex parte' or otherwise. It therefore applies in . . . investigations by a *legislature* or a body having legislative functions, and in investigations by *administrative* officials."<sup>109</sup> If so, how can testimony taken by the police be excluded? It is quite unnecessary to go to the extent indicated by Mr. Chief Justice White in *Bram v. United States*:<sup>110</sup> "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' " He was speaking of an admission secured by an officer of a foreign government while the accused was being held by its police for a Consul General of the United States. The language would be applicable to a confession obtained by a private detective or by members of a mob, to whom obviously the Constitutional provision has no application. But it should have application to its police officers in quite as full measure as the provision of the Fourth Amendment against unlawful search and seizure. If the police of any government, state or federal, are exempt from

106. *Emery's Case*, 107 Mass. 172 (1871); *Commonwealth v. Prince*, 313 Mass. 223, 46 N. E. 2d 755 (1943).

107. *Commonwealth v. Prince*, 313 Mass. 223, 46 N. E. 2d 755 (1943).

108. *Id.* at 231.

109. 8 Wigmore, *op. cit. supra* note 1, § 2252(c).

110. 168 U. S. 532, 542 (1897).

the prohibition of the privilege, then there may be grounds for profound satisfaction in the recent decisions of the Supreme Court holding that the use by a state court of a confession or admission coerced by the police is a violation of the Fourteenth Amendment.<sup>111</sup> By the same reasoning its use in a federal court must be forbidden by the corresponding provision of the Fifth Amendment.

### C. *Legislative Investigations*

It is generally agreed that the privilege, both at common law and as embodied in the Constitutions of the several states and of the United States, is applicable in all judicial investigations. What of investigations by a legislature or its committees? So far as the common law privilege is concerned, it may, of course, be modified or abolished by legislation, but the Constitutional privilege has no such infirmity. Consequently, the problem is one of constitutional interpretation. Speaking generally, the particular phrasing of the several provisions has had little or no effect upon their respective interpretations. Some provisions apparently limit the field of the privilege to "criminal cases"; others prohibit only the compelling of a person to be "a witness against himself," some speak in terms of the "accused." Yet the courts make the prohibition applicable to all sorts of non-criminal judicial proceedings and protect a person who is acting as a witness whether or not he is a party to the litigation and whether or not a formal accusation against him has been made or is contemplated.<sup>112</sup> And the Supreme Court of South Carolina has held that the provision in the Constitution of 1868, "No person shall be compelled to accuse or furnish evidence against himself," has not been made less extensive by the provision in the Constitution of 1895, "Nor shall [any person] be compelled in any criminal case to be a witness against himself."<sup>113</sup> The legislative history of the Fifth Amendment, in so far as it concerns the phrase, "in any criminal case," seems to furnish little or no aid in interpretation.<sup>114</sup>

While there can be no doubt that the Congress, through committees of the House and Senate, has the power to subpoena witnesses and obtain from them pertinent information to aid it in legislation—and apparently "the only legitimate object" is "to aid

111. See, e.g., *Watts v. Indiana*, 338 U. S. 49 (1949); *Ashcraft v. Tennessee*, 327 U. S. 274 (1946).

112. See 8 Wigmore, *op. cit. supra* § 2252.

113. *Ex parte Johnson*, 187 S. C. 1, 7-8, 196 S. E. 164 (1938).

114. See Note, *Applicability of Privilege against Self-Incrimination to Legislative Investigations*, 49 Col. L. Rev. 87, 90-94 (1949).

it in legislating,"<sup>115</sup> yet that power "must be exerted with due regard for the rights of witnesses" and "a witness rightfully may refuse to answer where the bounds of the power are exceeded. . . ." Mr. Justice Butler in the *Sinclair* case declared: "It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs."<sup>116</sup>

It would seem clear that the right not to incriminate oneself is included, as Chief Judge Cardozo assumed in *Matter of Doyle*.<sup>117</sup> Indeed, the fair inference from the opinions of the United States Supreme Court is that the privilege as established in the Fifth Amendment protects witnesses in Congressional investigations as fully as in judicial proceedings. But there is, as yet, no square decision to that effect.

The leading case in state courts is *Emery's Case*.<sup>118</sup> The provision of the Massachusetts Declaration of Rights has no limiting clause: "No subject shall . . . be compelled to accuse, or furnish evidence against himself," although the marginal note, "Prosecutions regulated," does indicate application to criminal proceedings. The Supreme Judicial Court, after stating that the "prohibition extends to all investigations of an inquisitorial nature, instituted for the purpose of discovering crime, or the perpetrators of crime, by putting suspected parties upon their examination in respect thereto, in any manner . . ." went on:

"But it is not even thus limited. The principle applies equally to any compulsory disclosure of his guilt by the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally for the purpose of establishing facts involved in an issue between other parties. If the disclosure thus made would be capable of being used against himself as a confession of crime, or an admission of facts tending to prove the commission of an offence by himself, in any prosecution then pending, or that might be brought against him therefor, such disclosure would be an accusation of himself, within the meaning of the constitutional provision. . . ."

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115. *McGrain v. Daugherty*, 273 U. S. 135, 178 (1927).

116. *Sinclair v. United States*, 279 U. S. 263, 291-2 (1929).

117. 257 N. Y. 244, 263, 177 N. E. 489 (1931), citing *Sinclair v. United States*, 279 U. S. 263 (1929).

118. 107 Mass. 172 (1871).



"... There is nothing in the terms of the article in question, to except legislative bodies from its operation. The nature and purpose of the provisions are equally applicable to investigations conducted by the legislature itself, or by one of its branches, or by a committee of its own members, as when conducted before the courts, or by commissioners, or other tribunals established by law. Such tribunals can in no case disregard this rule of protection. The legislature cannot, by the most formal and solemn enactments of law, authorize them to do it. If then the legislature cannot, by the formal enactment of all its branches, subject a citizen to such compulsory disclosure, it is difficult to see on what ground of argument or inference, from necessity, propriety, or the nature of constitutional republican government, an authority can be deduced for either branch of the legislature to do so by its more order.

"The protection of the subject is not secured by the Constitution, if it may be so invaded. . . . If other means of discovering offences and convicting offenders are thought to be inefficient or unsatisfactory, investigations by direct authority of the legislature, prompted by public complaints, and intended primarily to furnish information upon which that body may act in remedying abuses in the administration of public affairs, may easily be perverted into an effective means of procuring material to aid in the institution and maintenance of criminal prosecutions. Committees of the legislature, or commissioners acting under its order, to inquire into any supposed failure to enforce the laws, if freed from the restrictions of the Constitution in this particular, may be found useful and efficient as auxiliaries of the grand juries of the Commonwealth. In this way, parties exposed to prosecutions would find their constitutional protection to have failed them. It is the capability of abuse, and not the probability of it, which is to be regarded in judging of the reasons which lie at the foundation, and guide in the interpretation, of such constitutional restrictions."<sup>119</sup>

New York and South Carolina have in their Constitutions used the language of the Fifth Amendment, but their courts of last resort have reached the same conclusion.<sup>120</sup> The Court of Appeals of New York, in *Matter of Doyle*<sup>121</sup> speaking through Chief Judge Cardozo, declared: "The privilege in New York applies to an investigation by a Legislature as fully as to a trial in court."<sup>122</sup> Earlier in the opinion the Chief Judge characterized the constitu-

119. *Id.* at 181, 183.

120. *Matter of Doyle*, 257 N. Y. 244, 177 N. E. 489 (1931); *Ex parte Johnson*, 187 S. C. 1, 8-9, 196 S. E. 164 (1938).

121. 257 N. Y. 244, 177 N. E. 489 (1931).

122. *Id.* at 263.

tional provision as "a barrier interposed between the individual and the power of the government, a barrier interposed by the sovereign people of the State"; which "neither legislators nor judges are free to overleap. . . ." <sup>123</sup> Consequently he held the appellant "privileged to refuse to answer question that may tend to implicate him in a crime, unless by some act of amnesty or indemnity, or some valid resolution equivalent thereto, he has been relieved from the risk of prosecution for any felony or misdemeanor that his testimony may reveal." <sup>124</sup>

As to these pronouncements there was no dissent. Judge Pound's disagreement with his brethren concerned the sufficiency of the immunity from prosecution afforded the appellant.

In *Ex Parte Johnson* <sup>125</sup> the Supreme Court of South Carolina held the privilege properly claimed by a witness before a legislative committee:

"Manifestly these constitutional provisions are substantially declaratory of the common law, and it is obvious that if the privilege were limited to a criminal prosecution in which the witness was the defendant, it would fail entirely of its fundamental purpose. Hence it is uniformly held that the privilege is one which may be involved in any legal investigation, whether judicial or *quasi*-judicial; that is to say, it applies to examinations before any tribunal or other body that has power to subpoena and compel the attendance of witnesses."

*Emery's Case* and *Matter of Doyle* were ably argued and the opinions demonstrate thorough appreciation of the fundamental problem in the light of history and the essentials of official investigative procedures. In *Ex Parte Johnson* the argument was not so well buttressed by authorities, but the decision supported that of Mr. Justice Baker who had apparently put heavy reliance upon the opinion of Chief Judge Cardozo in *Matter of Doyle*. These well considered decisions, together with the assumptions and intimations in the opinions of the United States Supreme Court, as well as the generally accepted practice before legislative tribunals, seem to warrant the prediction that the privilege will generally be held available to witnesses in legislative investigations. <sup>126</sup> At any rate the legislative tribunal which proceeds on any other assumption will carry a heavy burden. It is to be hoped that the burden will

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123. *Id.* at 250.

124. *Ibid.*

125. 187 S. C. 1, 8, 196 S. E. 164 (1938).

126. See generally Ehrmann, *Duty of Disclosure in Parliamentary Investigation*, 11 U. of Chi. L. Rev. 1, 19-20 (1943); *id.* at 117 (1944).

prove too heavy to bear, for recent experience has demonstrated that legislative tribunals are prone to ignore the personal rights and liberties of citizens unless restrained by constitutional prohibitions.

#### D. *Production of Writings*

To what extent does the privilege protect a person from the production of a writing in his possession? In *The King v. Purnell*<sup>127</sup> both Court and counsel took it for granted that a defendant need not produce books containing matter incriminating him. And in *Roe v. Harvey*,<sup>128</sup> where the question was as to the effect of the refusal of a plaintiff in ejectment to produce a revelant deed, one of the justices, Yates, went so far as to say that the plaintiff was under no obligation to produce it, for "no man can be obliged to produce evidence against himself." But the other judges seem to have agreed with Lord Mansfield that "in civil causes, the Court will force parties to produce evidence which may prove against themselves. . . . But in a *criminal* or *penal* cause, the defendant is never forced to produce any evidence: though he should hold it in his hands, in Court."<sup>129</sup> The language in these cases seems to indicate that the privilege applies to all documents in the possession of the person whom their contents will criminate. If so, it is subject to much qualification by the American cases.

In *Wilson v. United States*,<sup>130</sup> the Court pointed out that a person who has custody of public records or official documents has no privilege to refuse to produce them even though they contain matter incriminating him personally. They are held "subject to examination by the demanding authority. . . . In assuming their custody he has accepted the incident obligation to permit inspection."<sup>131</sup> In like manner the custodian of the books of a corporation holds them subject to the visitatorial power of the Government. This principle was held to be well established in *Essgee Co. of China v. United States*.<sup>132</sup> An officer of a corporation "in whose custody are its books and papers is given no right to object to the production of the corporate records because they may disclose his guilt." In the *Austin-Bagley* case<sup>133</sup> the Court required the officer not only to produce the corporate books but also to identify them as books of

127. 1 Wm. Bl. 37 (1748).

128. 4 Burr. 2484 (K.B. 1769).

129. *Id.* at 2489.

130. 221 U. S. 361 (1911).

131. *Id.* at 382.

132. 262 U. S. 151, 158 (1923).

133. *United States v. Austin-Bagley Corporation*, 31 F. 2d 229 (2d Cir. 1939).

the corporate defendant. It will be noted that the basis of these decisions is the public or semi-public character of the documents. Incidentally, they were not the property of the custodian but of the corporation.

Of what significance is this fact of ownership? In *Ex Parte Fuller*,<sup>134</sup> the Supreme Court held that a bankrupt might be compelled to turn over to the Receiver his books which contained incriminating matter, because by operation of law the title and right to possession of the books had passed to the Receiver; it was immaterial that the transferee was or might be properly subject to a subpoena duces tecum. In *McCarthy v. Arndstein*,<sup>135</sup> Mr. Justice Brandeis explained the *Fuller* decision on the ground that the "privilege relates to the adjective law. It does not relieve one from compliance with the substantive obligation to surrender property." If this explanation is correct, it would seem to follow that if A has possession of a document which contains matter incriminating him and the document is the property of B, A cannot be required to produce it by process issuing against him as a witness. B may be entitled to get it by common law or equitable replevin and B may be required to produce it by process applicable to a witness; but if B is content to let A keep the document, A is safe. That such is not the case is demonstrated by *United States v. White*.<sup>136</sup> There the president of a local of the International Union of Operating Engineers was served with a subpoena duces tecum to produce specified records of the Union (which was unincorporated) before a grand jury. He refused on the ground that the records might tend to incriminate the local and himself as an officer or individual. The District Court found him guilty of contempt and sentenced him to 30 days in prison. On appeal the Third Circuit reversed, distinguishing a union from a corporation. The Supreme Court on certiorari reversed the Circuit Court of Appeals. The decision cannot be termed illiberal, for the opinion is by that great champion of all sections of the Bill of Rights pertaining to the liberties of the person, the late Mr. Justice Murphy. After stating that the privilege "protects the individual from any disclosure, in the form of oral testimony, documents or chattels, sought by legal process against him as a witness"—a generalization which would seem to fit this case exactly—Mr. Justice Murphy goes on to state the decisive applicable principle. "Moreover, the papers and effects which the

134. 262 U. S. 91 (1923).

135. 266 U. S. 34, 41 (1924).

136. 322 U. S. 694 (1944).

privilege protects must be the private property of the person claiming them, or at least in his possession in a purely personal capacity (citation). But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges."<sup>137</sup> It is on this ground and not on the basis of waiver or of the visitatorial powers of government over corporations that the decision squarely rests. And when the issue is whether the possessor of the document is holding it in a personal or representative capacity, the test is whether "a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. . . . Labor unions—national or local, incorporated or unincorporated—clearly meet that test."<sup>138</sup>

It must, then, be taken as settled that the federal constitutional privilege does not protect an individual from producing in response to subpoena (a) a writing which is of a public or semi-public character or (b) a writing of which he is not entitled to possession in his capacity as an individual. The state courts are at present free to give a different interpretation to their respective constitutional provisions, for the Supreme Court has thus far adhered to its previous position that the privilege against self-incrimination is not so "implicit in the concept of ordered liberty"<sup>139</sup> or so "basic to a free society"<sup>140</sup> as to be comprehended in the due process clauses of the Fourteenth Amendment.<sup>141</sup>

Wigmore, following the reasoning of Mr. Justice Hughes in the *Wilson* case,<sup>142</sup> puts on the same basis as public records, those required to be kept by a private citizen, such as a pharmacist, a druggist, a pawnbroker. The citizen is in this respect an *ad hoc* public official. In practically all the cases which he cites, the citizen required to make the record was required also to have a license to conduct the activity the details of which he was obliged to record. But Wigmore doesn't put the exemption from the privilege on the ground of consent by the licensee, as the courts do. He

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137. *Id.* at 699.

138. *Id.* at 701.

139. Mr. Justice Cardozo in *Palko v. Connecticut*, 302 U. S. 319, 325 (1937).

140. Mr. Justice Frankfurter in *Wolf v. Colorado*, 338 U. S. 25, 27 (1949).

141. *Adamson v. California*, 332 U. S. 46 (1947), 171 A. L. R. 1223 (1947); Comment, *The Adamson Case*, 58 Yale L. J. 267 (1949).

142. 221 U. S. 361, 381 (1911).

makes the following generalization: "There is no compulsory self-incrimination in a rule of law which merely requires beforehand a future report on a class of future acts among which a particular one may or may not in future be criminal at the choice of the party reporting."<sup>143</sup> He goes on to say that the same generalization is applicable to a requirement that a person, who is in no sense an *ad hoc* official, retain in his custody articles which may turn out to be evidences of a crime, e.g. the hide of every bovine animal slaughtered by him. Likewise it is the support of statutes requiring oral or written reports of the circumstances of any injury caused by the vehicle, machinery or other property of the reporter. This is because "the duty applies to a generic class of acts, irrespective of the criminality of any particular one (and it is certain that only an occasional one will involve criminality); and the duty exists anterior to the whole series of acts, so that the possible criminality is due to the party's own election, and the duty is independent of it. That the report may in a given case be later used in a criminal proceeding and that such a possible use was foreseen by the legislator, does not alter the fact that the duty existed prior to and independent of the criminality."<sup>144</sup> There may be a possible qualification in the term "generic class of acts" which will save the generalization from utter absurdity. If the killing of a bovine animal is a generic class of act, and the conduct of a citizen outside the limits of his own home between 11 p.m. and daylight is not a generic class of act, then it might be possible to uphold a statute which requires a report, and saving of the hide, of every bovine animal killed by a citizen, and to strike down a statute which requires a report of all acts done by each citizen outside the limits of his own home between 11 p.m. and daylight. Unless "generic class" is a limiting term, Wigmore's generalization would permit the destruction of the privilege in all or almost all situations by ingeniously drawn legislation. It does no more than state the result of the decisions in a form which will not bear analysis.

It is needless to say that no court has formulated or adopted such a generalization. In situations where a license is required for engaging in the activity and the objecting party is a licensee, judicial reliance for support of the regulation is upon waiver by acceptance of the license, as in *State v. Sterrin*.<sup>145</sup> It would not be

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143. 8 Wigmore, *op. cit. supra* note 1, § 2259(c).

144. *Id.* § 2259(d).

145. 78 N. H. 220, 98 Atl. 482 (1916).

difficult to produce arguments based upon the historical background of the privilege for the proposition that it never was conceived to have application to such situations, and to buttress them by considerations of over-powering public policy for the preservation of life, property and public safety. Where the activity is such that the state may properly require a license which would operate as a waiver of the privilege, it may impose an equivalent condition upon engaging in the activity. On this theory the statutes are justified which authorize service of process without the state on non-resident motorists in actions brought against them for injuries inflicted within the state.<sup>146</sup>

### E. Bodily or Mental Examination

Is the privilege limited to testimonial compulsion, that is, does it protect a person from anything other than compelling him to make, by words or other conduct, a communication "upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it?"<sup>147</sup> Does it cover personal features, qualities, or condition which he can not control? Specifically does it apply to the objective appearance of his body, his Bertillion measurements, his fingerprints, his footprints, the chemical content of his urine, of his saliva, of his blood, and the like? If the language of the applicable constitutional provision is interpreted as forbidding the compulsory furnishing of evidence, it seems fairly obvious that it covers all these; but if it is interpreted in the light of the origin and early purpose of the privilege it will be confined to those items of conduct which are used as conscious expressions of ideas. The conflicting views have been so thoroughly considered in treatises and decisions that further discussion would be a waste of time.<sup>148</sup> But attention must be called to the importance of a practical solution of the problem in current litigation, for example, in prosecutions for drunken driving and for crimes involving intent where the psychiatric condition of the accused is crucial, as well as in other situations where examination of the body of an accused may reveal matter, a scientific examination of which will furnish persuasive circumstantial evi-

146. See Restatement, Conflict of Laws §§ 84 and 85 and Comments (1934), and the recent Amendment affecting them.

147. 8 Wigmore, *op. cit. supra* note 1, §§ 2263, 2265.

148. For fingerprinting see *United States v. Kelly*, 55 F. 2d 67 (2d Cir. 1932); *Shannon v. State*, 207 Ark. 658, 182 S. W. 384 (1944); footprints, cases collected in 64 A. L. R. 1085, 1089 (1930); physical examination, cases collected in 159 A. L. R. 204, 216 (1945) and 164 A. L. R. 952, 967 (1946).

dence of guilt. An example of the extremely liberal view with reference to tests for intoxication is found in a recent *Wisconsin* case.<sup>149</sup> The accused upon arrest was compelled to go with a policeman to the office of a doctor, who noted the defendant's mental attitude, the odor of his breath, congestion of his eyelids and rate of pulse. Defendant was then required to write his name, to stand with his feet together and eyes closed and to touch the tip of his nose with the tip of each index finger alternately, and to "protrude his tongue from-into a midline." His speech and gait were observed and his deep and superficial reflexes were tested. The receipt of the testimony of the doctor that in his opinion, based on this examination, the defendant was suffering from acute alcoholism was held not to be a violation of the privilege against self-incrimination. In a *Texas* case where accused was required to perform some of the same acts as in the *Wisconsin* case and to furnish a sample of his urine for analysis, the court held the privilege violated.<sup>150</sup> The liberal attitude of the Wisconsin Court is matched by that of the majority of the Supreme Court of Oregon in admitting against defendant evidence of an analysis of a sample of his blood taken from him while unconscious.<sup>151</sup>

Wherever the evidence is confined to descriptions of involuntary reactions of the accused or to qualities of his body substances beyond his power of control, its admissibility is clearly justified by the more liberal interpretation of the constitutional provision. Where, however, he is compelled to do acts which he can use as a means of conveying ideas, the reception of evidence of his conduct raises serious questions as to the extent to which practical considerations affecting efficient enforcement of the law under modern conditions may be safely permitted to limit the right of privacy and personal liberty.<sup>152</sup>

#### F. *Jurisdictional Limits of the Privilege*

Whether the privilege operates outside the jurisdictional limits of the government whose court or legislature has created it is the subject of conflicting decisions.<sup>153</sup> In the *Murdock* case,<sup>154</sup> the

149. *Green Lake County v. Domes*, 247 Wis. 90, 18 N. W. 2d 348 (1945), 159 A. L. R. 204 (1945).

150. *Apodaca v. State*, 140 Tex. Cr. 593, 146 S. W. 2d 381 (1941).

151. *State v. Cram*, 176 Ore. 577, 160 P. 2d 283 (1945), 164 A. L. R. 952 (1945).

152. See generally Ladd and Gibson, *Legal-Medical Aspects of Blood Tests to Determine Intoxication*, 29 Va. L. Rev. 749 (1943).

153. 8 Wigmore, *op. cit. supra* note 1, § 2258.

154. *United States v. Murdock*, 284 U. S. 141 (1931).



Supreme Court first flatly decided that a person "under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law."<sup>155</sup> It stated the rule in unmistakable language: "The principle established is that full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination."<sup>156</sup> It cannot be said that Mr. Justice Butler's opinion is convincing. He asserted: "The English rule of evidence against compulsory self-incrimination, on which historically that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country." He cited *King of the Two Sicilies v. Willcox*,<sup>157</sup> and *Queen v. Boyes*.<sup>158</sup> The *Willcox* case rested on the ground that no English judge can know, as a matter of law, what would be penal in a foreign country, and that to make the disclosures dangerous the disclosing party must first quit the protection of the English law and wilfully go within the jurisdiction of the laws he has violated. The *Boyes* case had to do with immunity from prosecution in the courts which would not protect from impeachment by Parliament—obviously not a case of foreign law at all—and was decided on the express ground that the danger of impeachment was no more than a remote possibility. The *Willcox* case was distinguished in *United States v. McRae*,<sup>159</sup> where the pleadings showed that proceedings were pending in the United States for the forfeiture of the objector's property. In the first place, it should be noted that a decision in 1850 would scarcely exhibit the historical scope of the English privilege; next, that the *Willcox* reasoning had no application to the situation before the Court in the *Murdock* case, and that a later case by a court of equal rank was a square authority against Mr. Justice Butler's position. Of course, this is not to say that as an original question the Court and Wigmore<sup>160</sup> are wrong in holding that a rule established by one sovereignty for the protection of its citizens against governmental action should be confined to action by that government alone. Certainly the Fifth Amendment is a limitation only upon the powers of the Federal Government, and the provisions of any state constitution can have no limiting effect upon the powers of the

155. *United States v. Murdock*, 290 U. S. 389, 396 (1933).

156. *United States v. Murdock*, 284 U. S. 141, 149 (1931).

157. 7 State Trials n.s. 1050, 1068 (1850).

158. 1 Best & Smith, 311, 330 (1861).

159. L. R. 4 Eq. 327, L. R. 3 Ch. App. 79 (1867).

160. 8 Wigmore, *op. cit. supra* note 1, § 2258.

Federal Government or of that of any other state.. To be sure, a State may, if it chooses, so interpret its own provisions as to protect all persons against compulsory disclosure by its officers of matter which would expose them to danger of prosecution in any other jurisdiction or by any other sovereignty. The problem presented is one of policy, and some states refuse to accept the rule of the *Murdock* case.<sup>161</sup>

Granting the soundness of the *Murdock* doctrine, what is to happen when in the courts of sovereignty *A* a person is compelled to criminate himself under an immunity statute and the incriminating statements are offered against him in a prosecution in sovereignty *B*?

If the evidence obtained by a violation of *D*'s privilege in jurisdiction *A* is offered in jurisdiction *B*, the rules of *B* governing illegally obtained evidence are applicable; if obtained under an immunity statute, there is no taint of illegality. In either situation, does *B*'s constitutional provision affect admissibility? Certainly *A*'s constitution cannot operate to restrict the powers of *B*, or grant *D* an immunity against testifying in *B*. It seems equally obvious that when a court of *B* compels *W* to testify to words previously uttered by *D*, it is not compelling *D* to be a witness against himself or to testify against himself. This is literally true even where the words were the result of conduct on the part of officials of *B* in the course of an official investigation which violated *D*'s constitutional privilege; but in this situation, the courts have applied not the rules applicable to illegally obtained evidence but those applicable to the constitutional prohibition. *D*'s privilege to refuse to disclose self-incriminating material applies to inquiries made for the government of *B* by its official investigators. And adequate protection of the privilege requires the exclusion of evidence obtained by such a violation of the privilege, regardless of the medium by which it is presented in court. Does the same reasoning compel a construction of *B*'s constitutional provision which requires its courts to exclude self-incriminating evidence obtained by representatives of *A* by lawful means which, if used by representatives of *B*, would have been excluded because of *D*'s privilege? The majority of the United States Supreme Court has recently answered in the negative. Evidence of self-incriminating testimony given by *D* in a New York court under an immunity statute was held admissible against him in a criminal prosecution in a federal court sitting in New York.<sup>162</sup>

161. See, e.g., *In re Watson*, 293 Mich. 263, 291 N. W. 652 (1940).

162. *Feldman v. United States*, 322 U. S. 487, 498 (1944).

The minority insisted that to hold that a federal court "can convict a defendant of a federal crime by use of self-incriminatory testimony which someone in some manner has extracted from him against his will . . . cuts into the very substance of the Fifth Amendment."

This talk of the minority is not limited to a contention that as a matter of comity, a federal court sitting in a state should assist in its administration of justice by treating evidence procured by the state in exchange for a grant of immunity as inadmissible, in order to strengthen the inducement to a witness in the state court to make disclosure rather than to suffer the penalty imposable for refusal to do so. It is not even limited to the usual contention that the Fourteenth Amendment embodies the provisions of the Fifth. It would recognize no exception to the prohibition "based upon the persons who compel, their purpose in compelling or their method of compelling whether by threats of imprisonment, physical torture or other means."<sup>163</sup> This would make the Fifth Amendment applicable to private individuals as well as to officers of government and come close to accepting at face value the dictum in the *Bram* case,<sup>164</sup> that in the Fifth Amendment is imbedded the rule excluding improperly induced confessions.<sup>165</sup> It may be that the dissenters mean only to hold that the Amendment forbids the reception of the wrongfully secured evidence by a federal court, not the action of non-federal officials in obtaining it. Even so, it is submitted that the contention is unsound and that the real issue is one of comity and policy.<sup>166</sup>

#### G. *Waiver by Testifying*

The extent to which a person waives his privilege by testifying is the subject of conflicting decisions. By the English rule he may stop at any point. The American cases reveal various views. If the witness is the accused himself they run the gamut from no waiver to complete waiver; for the ordinary witness, they usually limit the waiver to matters connected with the conduct to which he has already testified. In the Federal Courts, the decisions of the Supreme Court are far from clear, but they imply that the accused

163. *Id.* at 497.

164. *Bram v. United States*, 168 U. S. 532 (1897). See note 110 *supra*.

165. See Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 Mich. L. Rev. 191, 201 (1930). It seems to accept this dictum.

166. See Comments in 30 Cornell L. Q. 255 (1944); 39 Ill. L. Rev. 184 (1944); 53 Yale L. J. 364 (1944).

and every other witness is subject to cross-examination upon all matters relevant to the content of his direct examination.<sup>167</sup> And where his testimony amounts to a denial of his guilt, he may be compelled to disclose that upon a former trial or upon a preliminary hearing he had not taken the stand.<sup>168</sup> Mr. Justice Stone found the argument fanciful which assumed that a rule admitting such evidence "might operate to bring pressure to bear on the accused to take the stand on the first trial, for fear of the consequence of his silence in the event of the second trial. . . . We are unable to see that the rule that if he testifies, he must testify fully, adds in any substantial manner to the inescapable embarrassment which the accused must experience in determining whether he shall testify or not."<sup>169</sup> But the Supreme Court of Missouri found this reasoning unpersuasive, cited the conflicting authorities, and insisted that the defendant should be completely free to exercise the privilege and that "no suspicion or incrimination should follow."<sup>170</sup> No satisfactory solution of the problem can be based upon conjectures as to an accused's speculations of imagined or possible advantages or disadvantages in later stages of the case or in other litigation. The answer should depend upon more fundamental considerations; and as to the impact of these upon the problem, judgments may well differ.

In a unique case the majority of the Circuit Court of Appeals of the Second Circuit assumed that in an adversary proceeding a witness who has revealed part of a transaction must reveal it all, in detail, and that this is especially true where he has disclosed all the elements of a crime; it had to determine whether this was true as to testimony before a grand jury or other tribunal in a non-adversary investigation. In *United States v. St. Pierre*,<sup>171</sup> St. Pierre had confessed before the grand jury that he had embezzled certain money, but he refused to disclose the name of the person to whom the money belonged. His contention was that if he were indicted and put on trial for the offense, his confession, though re-

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167. See, e.g., *Caminetti v. United States*, 242 U. S. 470, 492-495, (1917).

168. *Raffel v. United States*, 271 U. S. 494 (1926).

169. *Id.* at 498, 499.

170. *State v. Conway*, 348 Mo. 580, 589, 154 S. W. 2d 128 (1941). See also *Hall Motor Freight v. Montgomery*, 357 Mo. 1188, 212 S. W. 2d 748 (1948), 2 A. L. R. 2d 1292 (1948), applying the same reasoning to exclude in a civil action evidence that defendant failed to testify in a former criminal proceeding growing out of the same conduct.

171. 132 F. 2d 837 (2d Cir. 1942).

ceivable and received against him, would not support a conviction without corroboration; and that to reveal the identity of the person to whom the money belonged would furnish the prosecution with the means of securing the necessary corroboration. The Federal rule as to what constitutes incriminating evidence includes evidence of any fact tending to criminate though the fact is not a constituent element of any crime. Hence the name of the wronged person would be incriminating; and the problem was solely one of waiver. Judge Learned Hand wrote the opinion holding that the waiver was complete, and Judge Clark agreed. Judge Frank dissented because St. Pierre had not revealed enough to subject him to a penalty. Judge Hand's opinion pointed out (a) that St. Pierre had fully revealed the commission of a crime but refused to answer as to a detail and (b) that no decision dealing with waiver had ever suggested a distinction between an adversary and an inquisitory proceeding. He concluded that "surely, we should not resort to so unnecessary and deplorable an innovation." Judge Frank began by apparently attributing to the majority the notion that the privilege is effective not to prevent a disclosure which will result in punishment, but one which will result in disgrace. This unjustifiable assumption the majority would doubtless repudiate, and labor to refute it would be wasted. But what Judge Frank stressed was that there is no complete voluntary abandonment of the privilege by a person until the disclosure is of sufficient facts to subject him to punishment, although the privilege itself protects him from disclosing any fact that would tend to subject him to punishment. Certainly St. Pierre had disclosed the commission of a crime which as a matter of substantive law subjected him to punishment, but he had not revealed the source of sufficient admissible evidence to justify a conviction under the rules applicable in the Federal Courts. If we accept this line of reasoning, how can we make any distinction between an adversary and an inquisitory proceeding? Whether or not it would be unfair to the adversary to permit a witness to tell a half truth or give a garbled account can have no bearing at all on whether he has disclosed enough to enable the state to secure sufficient admissible evidence to justify his conviction. He is not a party to the proceeding or affected by the evidence. The remedy is not to destroy the privilege but protect the adverse party by striking out the evidence. To prevail, Judge Frank will have to stand on substantially the English rule. He must contend that a witness may stop at any moment until he has revealed facts which will subject

him to a penalty under the rules of law, procedural and substantive, of the jurisdiction where the disclosure is made. This is a contention that in effect abolishes waiver. If it is sound, it should be applied in all situations. There is no place for a rational distinction in this respect between an ex parte proceeding and an adversary proceeding.